ILE COPY

CORRECTED COPY

Office-Supreme Court, U.S.
FILED
FEB 10 1961
JAMES R. BROWNING, Clerk

No. 55

# In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, APPELLANT

*v.*

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS*

## REPLY BRIEF FOR THE UNITED STATES

ARCHIBALD COX,
*Solicitor General,*
W. WALLACE KIRKPATRICK,
*Acting Assistant Attorney General,*
JOHN F. DAVIS,
*Assistant to the Solicitor General,*
CHARLES H. WESTON,
GEORGE D. REYCRAFT,
BILL G. ANDREWS,
*Attorneys.*
*Department of Justice, Washington 25, D.C.*

# INDEX


| | Page |
|---|---|
| I. Congress contemplated and intended divestiture as the relief for acquisitions illegal under Section 7 of the Clayton Act | 3 |
| II. The relief ordered by the court below, by permitting a continuation of du Pont's illegal holding of General Motors stock, the receipt of dividends on that stock, and the voting of that stock by du Pont stockholders, provides an inadequate substitute for divestiture and does not protect the public from the adjudged violation of the Clayton Act | 7 |
| III. Divestiture by du Pont of the General Motors stock can be accomplished without undue hardship to the stockholders of either | 13 |
| Conclusion | 28 |


CITATIONS

Cases:


| | |
|---|---|
| *Continental Insurance Co.* v. *United States*, 259 U.S. 156 | 19–20 |
| *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 | 11 |
| *Fred B. Snite*, 10 Tax Ct. 523, affirmed, *sub nom. Commissioner of Internal Revenue* v. *Snite*, 177 F. 2d 819 | 24 |
| *Hartford-Empire Co.* v. *United States*, 323 U.S. 386 | 11 |
| *International Salt Co.* v. *United States*, 332 U.S. 392 | 11 |
| *Northern Securities Co.* v. *United States*, 193 U.S. 197 | 4 |

Cases—Continued Page

*Standard Oil Co.* v. *United States*, 221 U.S. 1 .. 4
*Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 .. 4
*United States* v. *American Tobacco Co.*, 221 U.S. 106 .. 4
*United States* v. *Crescent Amusement Co.*, 323 U.S. 173 .. 8, 14
*United States* v. *Great Lakes Towing Co.*, 217 Fed. 656 .. 4
*United States* v. *Lehigh Valley R.R. Co.*, 254 U.S. 255 .. 4
*United States* v. *Minnesota Mining & Mfg. Co.*, 96 F. Supp. 356 .. 4, 15
*United States* v. *Munsingwear, Inc.*, 340 U.S. 36 .. 12
*United States* v. *Reading Co.*, 253 U.S. 26 .. 4
*United States* v. *Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383 .. 4
*United States* v. *U.S. Gypsum Co.*, 340 U.S. 76 .. 11
*United States* v. *Union Pacific R.R. Co.*, 226 U.S. 61 .. 4

Statutes and regulations:

Clayton Act (Act of October 15, 1914), 38 Stat. 730, *et seq.*:
Sec. 7 .. 3, 5, 6, 7
Sec. 11 .. 5
Sec. 15 .. 5

Sherman Act, 26 Stat. 209, *et seq.*:
Sec. 1 .. 11
Sec. 2 .. 11

26 U.S.C.:
Sec. 302(a) .. 23
Sec. 302(b) .. 23
Sec. 311(a) .. 21

Statutes and Regulations—Continued
Treas. Regulations (Income Tax Regulations under 1954 Code):
Page
Sec. 1.302–2(b) ..... 24
Sec. 1.311–1(a) ..... 21
Sec. 1.311–1(e) ..... 21
Miscellaneous:
Brandeis, *Other People's Money*, pp. 4–5 ..... 10
Douglas, *Democracy and Finance*, pp. 32–33 ..... 10
Gilbert, *Dividends and Democracy*, pp. 7–12 ..... 12
Moody's Industrials, 1936, p. 1950 ..... 16
Moody's 1960 Industrial Manual, pp. 1040–1041 ..... 22
*New York Times* 1–9–61, p. 42 ..... 22
*Report of the Attorney General's Committee to Study the Antitrust Laws*, p. 356 ..... 4

# In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 55

UNITED STATES OF AMERICA, APPELLANT

*v.*

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS*

## REPLY BRIEF FOR THE UNITED STATES

In making their presentation, du Pont, General Motors and the *amici curiae*[1] all place their chief emphasis on the effect of divestiture on the stockholders of the two corporations. As to General Motors, this is understandable since any effect divestiture will have on its business, other than the asserted difficulty foreseen in obtaining new equity capital (G.M. Br. 87–91), must be to free it from any future restraints on the free exercise of its own managerial judgments. If it were

[1] In general, references to the appellees' briefs are intended to include reference to the brief of the *amici curiae* also. By and large, the briefs of General Motors, du Pont and the *amici* express the same position on all the major issues with only slightly different degrees of emphasis. The briefs will be referred to as D. Br. for du Pont, G.M. Br. for General Motors, Am. Br. for *Amici Curiae* and C. and D. Br. for Christiana and Delaware.

to admit influence by du Pont, its opposition could be explained as support for that company's interests. Since to admit that this was its motive would dispose of the case, General Motors is forced to speak only for its stockholders, or not at all.

As to du Pont, it can hardly argue that divestiture will impair its business, since its position from the start has been that its General Motors stock does not give it any business advantage. So it too must pitch its entire argument on the effect of the decree on its stockholders.

The *amici* were appointed for the specific purpose of representing the stockholders' interests in the two corporations, other than Christiana and Delaware. Thus in the end all of the briefs speak with the same voice.[2]

---

[2] It is assumed throughout the appellees' briefs, though the issue has no direct legal significance, that the stockholders of both corporations are "innocent". In this respect it may be worth noting that of the thirty-million du Pont shares held in blocks of 5,000 shares or more (GX 151, R. 2708–2720), and this is the group of stockholders as to which the tax consequences are asserted to be particularly severe, much more than half is held by members or associates of the du Pont family or present or past officials of du Pont or their descendants or affiliated companies, so that few of them, if any, would be considered bona fide purchasers without notice. As to the smaller stockholders, many bought their stock after this action was commenced. As to General Motors stockholders, the record discloses that the number has increased from 403,352 at the end of 1949, the year this action was instituted, to 724,833 at the end of 1958 (GMX 15, R. 3117), so that it is clear that at least 320,000 General Motors stockholders bought into the existing litigation, and the number is undoubtedly far larger.

For purposes of convenience this brief will follow the order of presentation of our main brief. We shall reply to appellees' arguments under the same headings used in our main brief without attempting to restate our original position except so far as is necessary for clarity.

## I

### CONGRESS CONTEMPLATED AND INTENDED DIVESTITURE AS THE RELIEF FOR ACQUISITIONS ILLEGAL UNDER SECTION 7 OF THE CLAYTON ACT

The appellees oppose our argument that the Clayton Act makes divestiture mandatory, or at least makes it the normal relief for a violation of Section 7, by asserting that both the language and history of the statute support their position. D. Br. 104–134; G.M. Br. 109–131; Am. Br. 10–21. There is little that we can add to our original discussion (Br. 29–40) and it would only impose on the Court to repeat it. However, there are flaws in the logic of the appellees' briefs which deserve mention.

A. In our original brief we contended that when Congress enacted the Clayton Act in 1914, it had in mind the nature of relief which had been granted in comparable Sherman Act cases, and by adopting the language of the Sherman Act showed an intent to require the same relief. We then cited a series of Sherman Act cases to show that divestiture was the method of relief utilized for this type of violation. Br. 35–36.

The appellees reply that although divestiture was required in some Sherman Act cases, many decisions, both before and after 1914, ordered other types of

relief. D. Br. 108–113; G.M. Br. 114–116; Am. Br. 14–16. The difference between us lies in what is considered to be a comparable violation. We consider a comparable case to be one where the heart of the violation is stock acquisition, the so-called merger violations. These cases are typified by the *Standard Oil* case, 221 U.S. 1, *American Tobacco*, 221 U.S. 106; and the early railroad cases, *Northern Securities Co.*, 193 U.S. 197; *Union Pacific*, 226 U.S. 61; *Lehigh Valley*, 254 U.S. 255, and *Reading*, 253 U.S. 26. We would not so classify conspiracy or combination cases such as *United States* v. *Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383; *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593; or *United States* v. *Minnesota Mining & Mfg. Co.*, 96 F. Supp. 356 (D. Mass.). There the formation or acquisition of controlled corporations were devices to carry out illegal combinations, but the heart of the violations was not the relationship of the defendants to the controlled corporations, but with each other. While divestiture may or may not be the appropriate relief when such corporations are merely a means for making a combination effective or for achieving a monopoly (see *United States* v. *Great Lakes Towing Co.*, 217 Fed. 656, 659 (D.C. N.D.-Ohio)), it has always been considered, as is stated by Dean Eugene V. Rostow in the *Report of the Attorney General's National Committee to Study the Antitrust Laws*, p. 356, that in merger cases divestiture is required.

B. The appellees argue that the Act does not require divestiture because the language of illegality

does not outlaw acquisition alone, but only acquisition which has certain results deemed undesirable by Congress. Therefore, say the appellees, if the court prevents the results from occurring by tinkering with the voting rights and imposing regulatory injunctive relief, then the acquisition is no longer illegal and need not be reversed through divestiture. D. Br. 126; G.M. Br. 127; Am. Br. 17.

We believe that this argument is specious. Section 11, on which we were relying as an aid to the construction of Section 15, prescribes the type of relief to be ordered by the several federal commissions for violations of Section 7. Until this relief becomes effective, the securities continue to be held in violation of law. Even assuming that prospectively something less than divestiture might prevent the undesirable economic results of the acquisition, this does not affect the mandatory nature of this provision. If the appellees were right and the touchstone for determining what is required for relief is whatever is necessary to suppress the results of an acquisition, rather than to eliminate their source, there would have been no need for this provision in the Clayton Act, since these very results were already illegal under the Sherman Act, whether brought about through stock acquisition, conspiracy, combination, or improper use of patents or otherwise. By the Clayton Act, Congress pinpointed a certain antitrust device and outlawed it. The relief contemplated was to undo that device, not to cover it up.

583520—61——2

C. In response to our argument that divestiture, if not mandatory, is the normal relief for a Section 7 violation, the appellees assert that this is not a normal case. D. Br. 133–134; Am. Br. 24–25. In a sense they are right since no two antitrust cases are exactly alike and there are certainly facts in this case which might distinguish it from all past, and probably all future, cases. But by referring to normal relief we had intended to mean that it was the kind of relief which would be applied unless the peculiar facts of a particular case made it possible to achieve the Congressional purpose of protecting the economy from the violation without divestiture. Neither the size of the enterprises here involved nor the length of time since the acquisition took place are pertinent in this respect. An abnormal case, in the sense we intended, might be one in which either the acquiring or acquired corporation had ceased to perform the business which was involved in the restraint so that no possibility of future effects remained. If du Pont had ceased to manufacture automotive supplies or if General Motors went out of the automobile and appliance business, the danger of restraint would end. In the absence of some such unusual factor, which certainly does not appear here, we continue to assert that divestiture is the necessary remedy.

## II

### THE RELIEF ORDERED BY THE COURT BELOW, BY PERMITTING A CONTINUATION OF DU PONT'S ILLEGAL HOLDING OF GENERAL MOTORS STOCK, THE RECEIPT OF DIVIDENDS ON THAT STOCK, AND THE VOTING OF THAT STOCK BY DU PONT STOCKHOLDERS, PROVIDES AN INADEQUATE SUBSTITUTE FOR DIVESTITURE AND DOES NOT PROTECT THE PUBLIC FROM THE ADJUDGED VIOLATION OF THE CLAYTON ACT

The silent premise of the appellee's argument is that the government has the burden to establish that the relationship permitted by the decree will result in further violation of Section 7. In other words, even though this Court has found that the existing relationship violates Section 7, the government is now to be put to the burden of establishing that, although some of the details are changed, the violation will nevertheless continue. In other words, the proceedings on relief are to be treated as a new antitrust proceeding. We submit that this is not the proper method of determining whether a proposed decree gives adequate relief.

Since the Court has found an acquisition in violation of Section 7, the decree is not to be tested by what is in effect a new Section 7 proceeding, but by whether the action undoes once and for all the action which caused the unlawful effects. To pass the voting rights on to the du Pont stockholders, to eliminate interlocking directors and officers and to enjoin specific activity does not undo the act; it merely suppresses some of its consequences. This is not enough. The duty of the court was to eliminate the breeding

ground for further violation. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189–190.

B. The appellees assert that divestiture is not necessary since the steps ordered by the district court eliminate all possibility of continuing restraints on competition or tendencies toward monopoly which might otherwise arise from the relationship. This is manifestly not so. While we cannot prove future events, common sense tells us that when du Pont continues to hold 23% of the common stock of General Motors, worth in the market two and one-half to three and one-half billion dollars, from which it derives roughly one-third of its income, and particularly when 15% of the voting rights of General Motors stock will be tied in perpetuity to du Pont stock, then the two enterprises will not, and cannot realistically be expected to, deal with each other as strangers, even when the normal chain of command is severed. If it is answered that this is a mere generality, let it be examined in the light of a specific situation.

Sometime in the future the Chevrolet management is going to have to determine whether to continue to use du Pont finish on its 1963 (or 1962 or 1964) models, or to substitute some other product which is competitive in quality and price. If the du Pont product is clearly inferior or its cost is out of line, we assume that General Motors will try to correct the matter or turn to some other supplier. If the du Pont product is clearly superior, then, too, there will be no question. But if the considerations are closely balanced, with one factor leading one way and another the opposite way, it is totally unreason-

able to assume that the continuing relationship between these two corporations will not have a very real bearing on the decision reached. While the record does not disclose what the value of paint sales to Chevrolet is today, if the proportion existing in prior years persists (353 U.S. 586, 596), some 71% of the over $50,000,000 a year (GX 179, R. 2752) spent on General Motors purchases from du Pont is for paint, and presumably the greater portion of this goes on Chevrolets. Since some 88% of du Pont's automotive business is with General Motors (GX 179, R. 2752), the opportunity to provide paint for Chevrolets is of tremendous importance. The 308,000 shareholders of du Pont (DPX 24, R. 3030) who would hold the right to vote some 43,000,000 of the General Motors shares owned by du Pont would be acutely unhappy if the loss of this business should come to their knowledge through trade publications or the manuals for the 1963 cars, or however else the matter happened to be disclosed. Even without any prearranged concert of action, they would prove difficult at the next stockholders meeting. But apart from these votes (we discuss below the suggestion that, if it would make things right with the government, du Pont would be willing to surrender their stockholders' rights to vote), there are many other ways for du Pont's dissatisfaction to have its effect. For example, many of the 308,000 stockholders and their families and their friends, and the businesses which they run, would not want to buy Chevrolets if du Pont turned to a competitor's paint. It is not unlikely that the du Pont Company itself might find it possible to improve its relations with other automobile companies

to the disadvantage of General Motors, if such a break should occur. And it is wholly possible for du Pont, without overt action, to exert considerable pressure through its other business and financial connections.[3] Perhaps, in spite of all this, General Motors would still turn to a competing supplier, but, if so, it would be in spite of the existence of a considerable influence and not because of the absence of such influence.

The example of the exercise of influence in the sale of automobile finishes was chosen because that is a field in which this Court found particular danger of Section 7 violation when the case was here before (353 U.S. 600–606). And there is plenty of room

---

[3] In our main brief we compared the exercise of influence in this situation to the influence exercised by investment bankers. Br. 44. In this connection, certain statements by Mr. Justice Douglas while an S.E.C. Commissioner are pertinent:

> In large segments of the business of investment banking a noncompetitive condition prevails. This is due in large measure to the control—direct or indirect—of business by the investment bankers. Others have pointed out the implications for business of the practice of having investment bankers represented on the boards of directors of corporations. Yet all of the hazards and dangers to investors arising by reason of the fact that bankers are represented on the boards of issuers might continue even though such relationships were to be abolished. Such hazards and dangers are inherent in control. That control may result not only from having a representative on the board but also from having a voting trusteeship or a strategic investment position—usually though not necessarily in stock; or it may result from subtle ties of friendship, from long periods of association, from favors rendered, from zones of influence in financial circles, or from an inertia which has never been challenged. [Douglas, *Democracy and Finance*, pp. 32–33.]

And see Brandeis, *Other People's Money*, pp. 4–6.

within the field covered by that opinion to foresee the continuing application of du Pont influence with respect to other products in spite of the terms of the decree below. But we do not agree that in considering the adequacy of the relief the government is by any means limited to that field. D. Br. 33–35, 46–51; G.M. Br. 41–44; Am. Br. 32–33. It is not as though the government were suggesting that relationships not found to be illegal be terminated, or that injunctive relief be granted with respect to transactions unrelated to the du Pont-General Motors entente. What we do urge is that it is entirely appropriate to consider all of the possible antitrust aspects of the relationship whether they have been adjudicated to be violations or not. This falls within the scope of what this Court has suggested as appropriate relief in *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, *International Salt Co.* v. *United States*, 332 U.S. 392; *United States* v. *U.S. Gypsum Co.*, 340 U.S. 76, and *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470.

The court below seemed to believe that its prior judgment that there had been no violation of Section 1 or 2 of the Sherman Act remains in full force because the Supreme Court reversed the judgment on the Clayton Act violation alone, without reaching the other issues. R. 3184, 3301. However, since an appeal was duly taken from that adjudication and the Court found it unnecessary to reach the merits on that issue, the situation is the same as though the case had become moot while the appeal was pending. It is generally accepted that under such circumstances the decision of the lower court should be vacated since

the appeal was frustrated. Cf. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36. Therefore, it is as though there had been no adjudication on the Sherman Act counts and it is appropriate in framing relief to take into consideration the provisions of that Act as well as of the Clayton Act.

C. It is surprising that du Pont should suggest the perpetual disenfranchisement of its 63,000,000 shares of General Motors stock. D. Br. 40–41. It is even more surprising to find Mr. Dallstream, who was appointed for the specific purpose of protecting the rights of the du Pont stockholders, apparently acquiescing in this suggestion. Am. Br. 34–35. Certainly this runs directly contrary to all current views as to the importance of corporate democracy, the theory that corporate management should be made more responsive to informed shockholder direction. See Gilbert, *Dividends and Democracy*, pp. 7–12. The government would hesitate to ask for relief which involves a retrogression toward the days of managerial dictatorship and a court of equity would be reluctant to encourage such corporate practice even if the parties agreed on it. But, even more important, from the antitrust viewpoint the sterilization of this General Motors stock suffers from the same basic fault as passing the vote along; it is an attempt to suppress the results of an illegal relationship rather than to cure the evil itself. It might reduce the du Pont influence over General Motors, but it would not eliminate it.

D. Finally, the appellees suggest that whatever defects turn up in the actual application of the decree

can be cured by going back to the district court for further relief under Section IX of the judgment (R. 3309–3310). D. Br. 31–32; G.M. Br. 33–34; Am. Br. 68–71.

This provision gives us little comfort. It would obviously be a difficult task to establish that General Motors has continued to use du Pont finishes or other products because of the intereorporate relationship, even if that were the true situation. And, if the present proceeding is any basis for judgment, such an application would take four or five years for final adjudication. The proceeding as to relief now before the Court commenced in 1957 and the end is not yet in sight. We do not believe that Congress intended that an invitation to litigate indefinitely in the future should be substituted for a prompt and effective decree.

## III

### DIVESTITURE BY DU PONT OF THE GENERAL MOTORS STOCK CAN BE ACCOMPLISHED WITHOUT UNDUE HARDSHIP TO THE STOCKHOLDERS OF EITHER

The district court rejected the government's proposal for divestiture primarily because of its tax consequences and the market disruption which it supposed would result. We disagree with the court's findings and, more importantly, with its view that taxes and market losses are a barrier to divestiture. But, beyond this, if the consequences of divestiture in the manner proposed by the government are objectionable to the appellees, there are variations in the methods of divestiture which the decree could leave open to them by which their objections could be

met without abandoning the basic objective of undoing the illegal acquisition.[4]

A. First, with respect to the impact of taxes, we point out below, *infra*, pp. 20–28, how appellees can avoid the major portion of the asserted tax burden by adopting alternative methods of distribution, but our main proposition is, as it was in our main brief, that the impact of taxation is irrelevant (Br. 59–62). Although the appellees appear reluctant to accept our good faith in advancing this argument (D. Br. 100–101, Am. Br. 45) they should not be surprised since our position merely follows the lead of this Court in *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189–190. Moreover, the heaviest impact is obviously on the very large stockholders (D. Br. 62, G.M. Br. 66, Am. Br.

[4] Appellees Christiana Securities Company and Delaware Realty and Investment Company correctly state in their brief (Br. 6) that the government is not asking this Court to direct any different or further relief against them if the decree permitting du Pont to continue to hold its General Motors stock should be affirmed. However, we continue of the belief that any judgment of divestiture must provide special safeguards as to these two companies because of their relationship to du Pont. Insofar as du Pont may divest through exchange offers, Christiana and Delaware should not be permitted to accept such offers. Insofar as the General Motors stock is distributed to du Pont stockholders in the form of dividends, Delaware and Christiana should be required to sell the stock so received. So far as divestiture may be carried out by sales by du Pont of its General Motors stock, sales to Delaware or Christiana should be barred (Br. 70).

We agree with Christiana and Delaware that the consideration of such restrictions is premature at this time. But appellees should not thereby imply withdrawal from the position that special provisions as to Christiana and Delaware should be included in any decree finally adopted.

41), and, as is pointed out in fn. 2, p. 2, *supra*, these are the individuals, or their descendents or their associates, who were most closely related to du Pont and must share in the responsibility for its actions (GX 151, R. 2708–2720).

In asserting that the fact of taxation is irrelevant we do not mean to preclude the appellees from selecting among equally effective plans for divestiture the means by which they will incur the least tax on themselves and their stockholders.[5] This is the same privilege that any taxpayer has to so arrange his business affairs as to avoid unnecessary taxation. But we believe this freedom of choice must be exercised within the framework of various methods of divestiture, since as pointed out above, we do not believe that any lesser relief will be effective. If, even so, the impact of taxation proves heavy, the remedy is with Congress, not this Court.

B. The burden of the argument that divestiture will seriously impair the market values of both du Pont and General Motors stock is based on the theory that it would cause a tremendous increase in the supply of those stocks, while reacting unfavorably on demand.[6] However, the price of a stock does not re-

---

[5] This is all that the decision in *United States* v. *Minnesota Mining & Mfg. Co.*, 96 F. Supp. 356, 358 (D. Mass.), cited by appellees (D. Br. 101, G.M. Br. 57–58), stands for.

[6] The appellees argue that apart from tax reasons trustees of trusts would sell du Pont stock to avoid allocation problems and litigation involving beneficiaries of the trusts (D. Br. 65–66). Corporations have issued stock dividends in the past of another corporation's stock which did not result in such problems. For ten consecutive years, 1948–1958, the Standard Oil Company of

spond to changes in demand to the same extent as does a consumer product which must be sold at any price or dumped. The price and rate of production of automobiles is directly responsive to demand, but the price of stocks is determined primarily by their yield and the earnings and business prospects of the issuer. Except as it may affect General Motors' ability to seek additional equity financing (G.M. Br. 87–91), it is not suggested that divestiture will impair the fundamental values of either security or reduce the earning capacity or dividend potential of either corporation. This is beside the fact, of course, that du Pont will no longer receive dividends from General Motors, which it has passed on in any event. With this in mind, it seems clear that the claimed effect on market values is vastly exaggerated. With a dividend-paying stock such as General Motors, every dollar that the price drops on the market increases the rate of yield, so that automatically the demand will increase and thus prevent the kind of depreciation envisaged by appellees. This was the weight of the testimony of

---

Indiana distributed shares of the Standard Oil Company of New Jersey to its stockholders as part of its regular cash dividend, ranging from 16.9% to 43.1% of the dividend (GX 685, R. 3001). A leading bank in Chicago had no problems in allocating these dividends in administering 1800 trusts (R. 2543–4). Similar evidence, pertaining to 1000 trusts, was presented with respect to the distribution of shares of stock of Northern Illinois by Commonwealth Edison Company to its stockholders for at least two years, 1954–1955 (R. 2543), and the distribution of shares of Radio Corporation of America to trusts holding General Electric and Westinghouse shares (R. 2544–5). Du Pont itself in 1935 paid approximately 10% of its dividend to stockholders in General Motors common stock. See Moody's Industrials, 1936, p. 1950.

several of the expert witnesses and it should not have been disregarded. See, *e.g.*, testimony of Dr. James J. O'Leary, R. 359–60, 364–5; of Dr. Roger F. Murray, R. 766–7, 790; of Dr. Irwin Friend, R. 987, 1009, 1023, 1024–5, 1031; and of Mr. Alfred Boni, R. 1211–16, 1231, 1234, 1238–9.

Assuming that divestiture, however accomplished, will have some adverse effect on the market price of du Pont and General Motors stock, we submit that this is not a controlling consideration in the formulation of a judgment giving effective relief. Almost inevitably, any required divestiture is likely to have some effect up or down on the market price of the stock of the divestor and of the stock divested. The most that defendants adjudicated to have violated the antitrust laws, or those subjected to a violation by another, can demand is that divestiture be carried out in such fashion as to avoid dislocation of market values so far as reasonably feasible.

C. The appellees respond in two ways to our suggestion that their objections to the plan for divestiture incorporated in the government's proposed decree can be largely eliminated by a judgment which permits du Pont to choose the methods of disposing of the stock to meet their particular problems. First, they assert that the Court should limit its consideration of divestiture to the particular plan set forth in the proposed decree submitted by the government. G.M. Br. 27–28, Am. Br. 54–57. Second, they argue that the variations which we suggested in our main brief (Br. 66–80) do not cure the objectionable features of the plan. D. Br. 71–95, G.M. Br. 61–108, Am. Br. 58–68.

1. The appellees repeatedly assume that the government has "abandoned" its proposal to the court below which, they say, was the object of the evidence offered by all the parties (D. Br. 72, G.M. Br. 27, Am. Br. 57). They imply that the record contains no material on the basis of which the variations can be considered. Our answer is that we have not abandoned anything. Specifically we are attacking the decree issued by the court as ineffective to give the necessary relief and we are arguing that divestiture is necessary and appropriate. It would be unreasonable to limit the government or the court to consideration of a single method of divestiture merely because it was the particular method proposed pursuant to the court direction that the government submit a specific plan. At all times while proposing a specific plan, the government has recognized that the appellees might suggest and the court consider other methods of disposing of the stock. R. 6, 287, 3339–40. The appellees cannot be criticized for opposing divestiture in any form rather than trying to work out the most acceptable means, but such tactics do not conclude the matter.[1]

---

[1] Du Pont's assertion (D. Br. 71) that "the appellees, the *amici curiae*, and the District Court considered exhaustively whether there was a method or a combination of methods by which divestiture" could be accomplished is not supported by the record. What the appellees considered we cannot know, but we do know that, with one limited exception, they did not make the results of such consideration available to the court. *Amicus* Dallstream did propose a plan for voluntary "takedowns" of

As to there being no evidence on the record on which to judge the effects of variations in the plan for divestiture, the appellees themselves are the first to claim that their evidence with respect to market consequences of divestiture is equally applicable to the methods of divestiture which would be available to du Pont under a judgment of the kind outlined in our original brief. D. Br. 58, G.M. Br. 62–63. The government's evidence, moreover, clearly has application to such other methods. The record, we believe, is such that the Court can make a determination as to whether divestiture is possible by utilizing a variety of methods without incurring the harmful effects foreseen by the appellees. This is all that we have urged—that divestiture can be accomplished without undue hardship to either du Pont or General Motors stockholders.

Far from being precluded from considering alternatives to the government's position below, this Court has held that an inadequate provision in a judgment is not to be sustained although the government assented to it in the district court and no error respecting it was assigned on appeal. See *Continental In-*

---

General Motors stock which would have resulted in the divestiture of a speculative quantity of du Pont's holdings and the court did consider this in its decision. R. 39–43, 3190–3192. The court itself stated (R. 3249): "Alternative methods were not suggested by any of the parties." Therefore, the court's determination as to alternative methods was limited to the Dallstream proposal and certain tentative suggestions advanced by the government in its pretrial brief.

*surance Co.* v. *United States*, 259 U.S. 156, 165–166, 168–170.[8]

2. As is pointed out in our main brief (Br. 66) we did not attempt to canvass all possible methods by which the appellees could combine methods of divestiture to meet their objections. To give the Court some basis for judging the potentialities of providing flexibility in the decree, we suggested several alternative methods which the appellees might find it profitable to explore. To date their exploration of these alternatives has not led them to an enthusiastic embrace of any of them. However, their bases for objection support the view that here, as in the district court, their tactics are to assert that all divestiture is bad and that disaster can be avoided only by permitting them to continue their association. It is worth while to analyze their objections in order to test this premise.

(a) *Exchange Offers.* Our main brief stated (Br. 66–67) that du Pont could divest itself of an almost unlimited number of General Motors shares by making offers to its common and preferred stockholders to exchange a given number of General Motors shares for a share of du Pont. We further stated that du Pont would pay no income tax on these exchanges and that the tax, if any, to stockholders accepting such offers would be a capital gains tax (25% maximum)

[8] We note that the change in the provisions of a mortgage securing an outstanding bond issue, which this Court directed, was made notwithstanding that injury might thereby be caused to "innocent persons", the bonds in question having passed into the hands of "numerous and widely scattered holders", few of whom, if any, "are or were identified at all with the management" of the defendant companies. 259 U.S. at 171.

on the difference between the current market value of the General Motors shares received and the stockholders' cost basis for the surrendered du Pont shares.*

Both du Pont and the *amici* cast doubt on whether du Pont would be free of tax on these transactions. D. Br. 77, 79; Am. Br. 60. They do not question that under 26 U.S.C. 311(a) the distribution of property to stockholders generally results in no tax to a corporation, and that the section applies to a distribution made in redemption of stock. See Treas. Reg. 1.311-1(a). But both refer to Treas. Reg. 1.311-1(e), which excepts transactions "between a corporation and a shareholder in his capacity as debtor, creditor, employee, or vendee, where the fact that such debtor, creditor, employee or vendee is a shareholder is incidental to the transaction." Apparently the doubt is based on the ground that the proposed exchange could be deemed a "sale" and the stockholder a "vendee." However, the exchange would be made solely because the "vendee" is a stockholder so that that fact is not incidental. The example given in the Regulation is of a transaction wholly unrelated to stockholder status, namely, where a company engaged in manufacture and sale of automobiles sells an automobile to an individual and accepts payment in its own stock.

Du Pont has not questioned our statement as to the tax effect of exchange of General Motors shares

* We noted (Br. 66) that retirement of the surrendered du Pont stock would appropriately reduce its capital stock account in approximate correspondence with the reduction in its assets resulting from divestment of the General Motors stock delivered in exchange.

for du Pont preferred, and merely questions whether a significant number of shares could or would be divested by this method. Of course, to induce substantial acceptance of offers, they would have to be made on the basis that the General Motors shares offered would have to have a greater value (at current market prices) than the surrendered du Pont stock.[10] However, du Pont suggests (Br. 79) that to do this "in the absence of a normal business justification" would inequitably favor its preferred stockholders over its common stockholders. D. Br. 79. But under a judgment requiring divestiture du Pont would have ample "business justification" for making exchange offers on a basis which would stimulate wide acceptance—du Pont could so divest without tax liability and no tax liability woud be forced on any accepting stockholder. Furthermore, even the assumed favoritism to preferred stockholders would be non-existent if du Pont made exchange offers to its common stockholders on an equally favorable basis.

Du Pont does not directly deny that an almost unlimited number of General Motors shares could be divested through the medium of exchange offers to du Pont common stockholders, provided the tax effect is what we stated. Indeed, the *amici* have observed

---

[10] We agree that the value of the General Motors stock offered could not exceed the call price of the preferred stock, but the difference between the call price and the market price of du Pont's preferred is more than sufficient to permit offerings made on a basis which would lead to wide acceptance. High 1960 price of 4½% preferred, 103, call price, 120; high 1960 price of 3½% preferred, 83, call price 104 (Moody's 1960 Industrial Manual, pp. 1040–1041; *New York Times* 1–9–61, p. 42).

(Br. 61) that an offering might attract so many tenders that du Pont would have to accept on a pro rata basis. But du Pont asserts (Br. 79, 85) that the "tax complexities" of the suggested exchange "are enormous".

In spite of the pages of doubts (D. Br. 79–83) we submit that the General Motors shares received by a du Pont stockholder through acceptance of an exchange offer are not dividend income but are a loss or gain on the sale or exchange of property. 26 U.S.C. 302(a) provides that if a corporation redeems its stock, "and if paragraphs (1), (2), (3), *or* (4) of subsection (b) applies, such redemption shall be treated as a distribution in part or full payment *in exchange for* the stock." All exchanges of General Motors stock for du Pont stock would be within Section 302(a) because they would be within paragraph (1) of Section 302(b), which provides: "Subsection (a) shall apply if the redeemption is not essentially equivalent to a dividend."

The essential characteristic of a dividend is that it is the same for all holders of a given class of stock. General Motors shares distributed to du Pont stockholders pursuant to acceptances of an exchange offer would not go to these stockholders on the same per share basis, but on a radically different basis. Many stockholders would accept the stock offer as to none of their shares, many as to part of them, and many as to all. The result would be, as to some, total extinguishment of their du Pont-stockholder interest, as to some a partial extinguishment, and as to some no extinguishment at all. Indeed, only in exceptional cir-

cumstances could a distribution which was not pro rata as to all stockholders of a given class be "essentially equivalent to a dividend". See Treas. Reg. § 1.302-2(b).

We submit that the matter is squarely covered by the rationale of *Fred B. Snite,* 10 Tax Ct. 523, in which the Commissioner acquiesced (C.B. 1950-1, p. 5) after the decision had been affirmed in *Commissioner of Internal Revenue v. Snite,* 177 F. 2d 819 (C.A. 7). In that case two individuals owned all the stock of a corporation; one sold it 1,360 shares, and the other 2,140 shares, at $150 a share; the corporation had undistributed profits in excess of the total purchase price; and the stockholder's tax returns reported the difference between the stock's cost and its sales price as a capital gain. The Tax Court held that the payments to them were not "substantially equivalent to a dividend." It said that the taxpayers "parted with their title to 3,500 shares"; that their "proportionate ownership has been substantially changed"; and that these results "could never follow from the distribution of an ordinary taxable dividend". 10 Tax Ct. at 532. The court of appeals, in affirming, said that the transaction "was, in its essence, a sale of an asset for a stated valuable consideration, resulting in a profit, for which the taxpayers duly accounted." 177 F. 2d at 822.

If du Pont is interested in trying this method, we suggest that a ruling of the Commissioner can be obtained as was done with respect to the tax status of distribution by way of dividends (ADX 2; R. 3171).

(b) *Stock Dividends.* Our main brief (67–68) stated that a substantial part, at the very least one-sixth, of the required divestment of General Motors stock could be made without any tax to du Pont and without imposition of any additional tax on its stockholders, by du Pont paying part of its dividend in General Motors stock rather than cash, with the cash and stock not exceeding du Pont's normal customary dividend rate (ranging in recent years from $6.00 to $7.00 per share). We further stated that if this course were followed there would be no appreciable adverse effect on the market price of du Pont or General Motors stock.

Appellees erroneously state that divestiture of stock in this way would not "mitigate" the tax "burdens" on du Pont stockholders (D. Br. 94), that these burdens would "not be alleviated, they would merely be disguised" (Am. Br. 64). The fact is that there would be no tax impact or burden whatsoever.

Appellees suggest that if du Pont pays the part of its dividend in stock rather than cash, vast sums of money (otherwise paid out as dividends) will remain in du Pont's hands, use of which is potentially fraught with new antitrust violation (D. Br. fn. 69, pp. 94–95; Am. Br. fn. 24, p. 63). Actually, if the part payments in General Motors stock equal one-sixth of the required divestiture, the earnings annually retained by du Pont would be about $4,500,000, and if they should equal one-third, the earnings annually retained would be about $9,000,000. If these funds were not needed in its business, du Pont could use them to reduce its capital.

We repeat the statements in our main brief (68–69) that the court did not find that market prices would be impaired if du Pont paid dividends partly in cash and partly in stock (and the year's combined payment did not exceed du Pont's usual dividend payout) and that such testimony as there was that market prices would be impaired in these circumstances is vague and almost *pro forma*.

Payment of dividends on this basis could hardly lead to sale of du Pont stock in any significant amount. The stockholder would be receiving as much by way of dividend as before, and the stock distribution would not deplete du Pont assets since it would retain in its treasury cash roughly equivalent to the value of the distributed General Motors stock. An important corporation, Standard Oil Company (Indiana) has found it to be in the interest of its stockholders to maintain continuously for 13 years a policy of paying dividends partly in cash and partly in stock, and the payment in stock has represented on the average over one-third of the total dividend payment (GX 685, R. 3001). While some selling of du Pont stock would undoubtedly be caused if it substituted General Motors stock for part of its usual cash dividend, there is no reason to suppose that the resulting sales would cause any material or more than temporary impairment of the stock's market price.

As to General Motors stock, the effect of such dividend payments on the market price of General Motors stock would also be negligible. The du Pont stockholder would be receiving, by the distribution, a direct stock interest in General Motors equivalent

o the indirect interest therein represented by his
u Pont stock. He would therefore have, as an
nvestor, little or no reason to sell the distributed
tock. Except in the case of the stockholders in
he highest income brackets, the cash dividends
vould be sufficient to meet the tax liability. The
ales which might occur by those who for some rea-
on should feel that General Motors is not a desirable
nvestment would scarcely be more than negligible
n relation to the nearly 290,000,000 shares of General
Motors outstanding.

(c) *Sales of General Motors Shares.* We pointed
ut in our main brief that, with the wide and favora-
le opportunities to divest afforded by exchange offers
nd payment of part-cash, part-stock dividends, the
umbers of shares left to be divested by direct sales
y du Pont would hardly exceed 50% of the required
livestiture; that if as much as half of the re-
uired total should be divested by sale, General
Motors' needs for its own stock could absorb two-
hirds of the sales; and that du Pont would have a
hoice, in disposing of any balance, of direct sale to
nstitutional investors, sale through underwritten of-
erings, and open market sales. We pointed out that
he tax impact to du Pont, even if half the required
livestiture was by sale, would amount to only 66¢ per
hare of du Pont yearly during the distribution
eriod, while du Pont's price range in 1960 was over
85 a share and in 1959 over $76 a share. Finally,
we pointed out that, in the light of the evidence, such
ales of General Motors stock as might be requisite
o comply with the provisions of the suggested divest-

iture judgment could be made without appreciable or significant adverse effect on the market price of General Motors stock. See our main brief, pp. 70-72.

We find nothing in the appellees' briefs which undermines our original development of absence of undue hardship to stockholders incident to such sales of General Motors stock as might be made to carry out required divestiture.

## CONCLUSION

It is respectfully submitted that for the reasons stated in our main brief as supplemented here the judgment of the district court should be reversed.

ARCHIBALD COX,
*Solicitor General.*
W. WALLACE KIRKPATRICK,
*Acting Assistant Attorney General.*
JOHN F. DAVIS,
*Assistant to the Solicitor General.*
CHARLES H. WESTON,
GEORGE D. REYCRAFT,
BILL G. ANDREWS,
*Attorneys.*

FEBRUARY 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961